Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO 25–87–04 OF 2014
ASMABI MOHAMAD J
25 SEPTEMBER 2015

Constitutional Law — Citizenship — Application for — Respondent dismissed applicants' application for citizenship — Applicants filed judicial review against respondents' decision — Whether applicants fulfilled requirement to obtain citizenship by operation of law as specified under art 14(1)(b) of the Federal Constitution — Whether issue in judicial review application involved non-justiciable matter, which court did not have any jurisdiction to hear as stated under Part III, Second Schedule of the Federal Constitution — Federal Constitution art 14(1)(b)

The first applicant was the father of the second applicant who was said to be born in Hospital Tung Shin, Kuala Lumpur, Malaysia by a citizen of Thailand by the name of Rai-Putta Thipphawan. The first applicant had applied to the second respondent for the citizenship of the second applicant nevertheless the said request was dismissed by the second respondent. Dissatisfied with the respondents' decision, the applicants filed the present application for judicial review. The issues for court's determination were: (a) whether the applicants had fulfilled the requirement to obtain citizenship by operation of law as specified under art 14(1)(b) of the Federal Constitution ('the Constitution'); (b) whether the Convention on the Elimination of All Forms of Discrimination Against Women ('the CEDAW'), Convention on the Right of the Child ('the CRC') and International Convention on Civil and Political Rights ('the ICCPR') were applicable; and (c) whether the issue in the present judicial review application involved a non-justiciable matter, which the court did not have any jurisdiction to hear as stated under Part III, Second Schedule of the Constitution.

Held, dismissing the application with costs of RM2,000:

(1) Section 1(e) of the Part II of the Second Schedule of the FC was inapplicable to the applicants' case and could not be used as a ground to demand for a citizenship status under operation of law. This was because, the citizenship of the second applicant was determinable as the second applicant's father was a Malaysian and the mother was of Thai origin. Further, the second applicant's citizenship was the Thailand citizenship which right had been conferred pursuant to s 7 of the Thai Nationality

Act B E 2508. Therefore, the contention of the applicants that the second applicant was a stateless person pursuant to s 1(e) of Part II, of the Second Schedule of the Constitution could not hold water (see paras 12, 14 & 16–17).

(2) The Universal Declaration of Human Rights ('the UDHR') was merely a declaration, thus it was not a legally binding document for the court to give effect. The UDHR is applicable in Malaysia only to the extent that it is not inconsistent with the Constitution. Further, international treaties do not form part of the law in Malaysia unless such treaties have been incorporated into the municipal law. In the circumstances, the applicant had failed to satisfy the court that the relevant treaty and/or convention had been adopted by way of a specific Act. Hence there was no evidence to show that these international human rights conventions were applicable to the factual matrix of the case to allow the said application under art 14(1)(b) of the Constitution read together with s 1(e) Part II, Second Schedule of the Constitution (see paras 21, 31 & 35).

(3) The matter surrounding the present application for judicial review concerned a decision made pursuant to Part III of the Constitution which matter is non-justiciable as provided under s 2, Part III of the Second Schedule of the Constitution. The provision clearly ousted the jurisdiction of the court to decide on issues relating to the decision on the citizenship of the second applicant. Thus, it was obvious that the applicants' application for judicial review ought not to be entertained by the court as the Constitution did not at all provide the avenue for the applicants (see paras 38 & 41).

[Bahasa Malaysia summary

Pemohon pertama adalah bapa pemohon kedua yang dikatakan dilahirkan di Hospital Tung Shin, Kuala Lumpur, Malaysia oleh seorang warganegara Thailand bernama Rai-Putta Thipphawan. Pemohon pertama membuat permohonan kewarganegaraan kepada responden kedua bagi pemohon kedua tetapi permohonan tersebut ditolak oleh responden kedua. Tidak berpuas hati dengan keputusan responden-responden, pemohon-pemohon memfailkan rayuan ini bagi semakan kehakiman. Isu-isu bagi pemutusan mahkamah adalah: (a) sama ada pemohon-pemohon telah memenuhi keperluan untuk mendapat kewarganegaraan melalui operasi undang-undang seperti yang diperuntukkan oleh perkara 14(1)(b) Perlembagaan Persekutuan ('Perlembagaan'); (b) sama ada Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'), Convention on the Right of the Child ('CRC') dan International Convention on Civil and Political Rights ('ICCPR') terpakai; dan (c) sama ada isu dalam permohonan semakan kehakiman ini melibatkan hal perkara yang tidak boleh diadili, yang mana

mahkamah tiada bidang kuasa untuk dibicara di bawah Bahagian III, Jadual Kedua Perlembagaan. A

Diputuskan, menolak permohonan dengan kos RM2,000:

(1) Seksyen 1(e) Bahagian II Jadual Kedua Perlembagaan tidak terpakai pada kes pemohon-pemohon dan tidak boleh diguna pakai sebagai alasan untuk menuntut status kewarganegaraan di bawah operasi undang-undang. Ini kerana, kewarganegaraan pemohon kedua ditentukan oleh bapa pemohon kedua yang berwarganegara Malaysia dan ibunya yang berasal dari Thailand. Selanjutnya, kewarganegaraan pemohon kedua adalah Thailand seperti yang diperuntukkan oleh s 7 Thai Nationality Act B E 2508. Oleh itu, hujahan pemohon bahawa pemohon kedua adalah seorang yang tidak berwarganegara di bawah s 1(e) Bahagian II, Jadual Kedua Perlembagaan tidak boleh dikekalkan (lihat perenggan 12, 14 & 16–17). B C D

(2) Deklarasi Universal Hak Asasi Manusia ('DUHAM') hanyalah deklarasi yang bukan dokumen mengikat bawah undang-undang untuk diguna pakai oleh mahkamah. DUHAM terpakai di Malaysia setakat jika tidak tak konsisten dengan Perlembagaan. Selanjutnya, triti-triti antarabangsa tidak membentuk undang-undang di Malaysia melainkan triti-triti sedemikian telah diserapkan dalam undang-undang munisipal. Dalam hal keadaan ini, pemohon gagal memuaskan mahkamah bahawa triti/konvensyen yang relevan diguna pakai dalam akta yang khusus. Oleh itu, tiada keterangan untuk menunjukkan bahawa konvensyen-konvensyen hak-hak asasi manusia antarabangsa terpakai dalam fakta matrik kes untuk membenarkan permohonan tersebut di bawah perkara 14(1)(b) Perlembagaan dibaca bersama-sama s 1(e) Bahagian II, Jadual Kedua Perlembagaan (lihat perenggan 21, 31 & 35). E F G

(3) Hal keadaan permohonan bagi semakan kehakiman ini berkaitan keputusan yang dibuat di bawah Bahagian III Perlembagaan yang hal perkaranya adalah pertikaian yang tidak boleh diadili seperti yang diperuntukkan bahawa s 2, Bahagian III Jadual Kedua Perlembagaan. Peruntukan ini jelas menyingkirkan bidang kuasa mahkamah untuk memutuskan isu-isu berkaitan keputusan kewarganegaraan pemohon kedua. Oleh itu, jelas bahawa permohonan pemohon-pemohon bagi semakan kehakiman tidak patut dilayan oleh mahkamah kerana Perlembagaan tidak langsung memperuntukkan jalan untuk pemohon-pemohon (lihat perenggan 38 & 41).] H I

Notes

For a case on application for citizenship, see 3(2) *Mallal's Digest* (5th Ed, 2015) para 2397.

Cases referred to

AirAsia Bhd v Rafizah Shima bt Mohamed Aris [2014] 5 MLJ 318, CA (refd)
Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal [2011] 6 MLJ 297, FC (refd)
Kuluwante (an infant) v Government of Malaysia & Anor [1978] 1 MLJ 92 (refd)
Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449, FC (refd)
SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) [2010] 2 MLJ 377, HC (refd)
Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60; [2006] 1 CLJ 927, CA (refd)

Legislation referred to

Federal Constitution arts 14, 14(1)(b), 15, 15A, 16, 16A, 18, 19, 22, 76, Second Schedule, Part II, ss 1(a), (b), (c), (d), (e), Part III, ss 2, 4
Human Rights Commission of Malaysia Act 1999 s 4(4)
Rules of Court 2012 O 53 r 3(2)
Nationality Act B E 2508 [TH] s 7

Latheefa Beebi Koya (N Surendran with her) (Daim & Gamany) for the applicants.
Maisarah Juhari (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Asmabi Mohamad J:

THE APPLICATION

[1] By this judicial review application for leave ('encl 1'), the applicants sought from this court the following reliefs:

1.1. a certiorari to move the court to quash the decision of the second respondent made in a letter dated 11 October 2013 which dismissed the second respondent's application for citizenship pursuant to art 15A of the Federal Constitution ('the FC');

1.2. a declaration to recognise the second applicant as a citizen by operation of law under the Second Schedule, Part II, s 1(a) (art 14(1)(b) of the FC); or

1.3. a declaration to recognise the second applicant as a citizen of Malaysia by way of operation of law under the Second Schedule, Part II, s 1(e) (art 14(1)(b)) of the FC;

1.4. an order of mandamus to direct the first respondent to issue MyKid or a certificate to certify the second applicant as a Malaysian citizen by

operation of law under art 14(1)(b) of the FC;

1.5. a declaration that the respondents had infringed the second applicant's basic rights guaranteed under the FC and/or under other laws which provide the benefits and confer certain rights to the citizens of Malaysia; and

1.6. costs and other consequential reliefs this court deems fit.

[2] When the application for leave came up for hearing on 14 July 2014 before the learned Zaleha Yusof J, Her Ladyship had granted the applicants leave with respect to prayer (iii), a declaration to recognise the second applicant as a citizen of Malaysia by way of operation of law under the Second Schedule, Part II, s 1(e), art 14(1)(b) of the FC and a mandamus to be issued to the first respondent to issue Mykid or Certificate of Citizenship to recognise the second applicant as a Malaysian citizen by operation of law under art 14(1)(b) of the FC. Reliefs (i) and (ii) (stated in paras 1.1 and 1.2) prayed for were rejected by the court.

THE DOCUMENTS

[3] For the purpose of the hearing of this judicial review application ('encl 8') the following documents were filed and referred to by the court:

(a) the applicants' application for judicial review (leave) dated 28 April 2014 ('encl 1');

(b) statement under O 53 r 3(2) of the Rules of Court 2012 ('encl 2');

(c) the applicant's affidavit in support affirmed on 28 April 2014 by Lim Jen Hsian ('encl 3');

(d) a declaration of person under disability by solicitor dated 28 April 2014 ('encl 4');

(e) the judicial review application ('encl 8'); and

(f) the respondents' affidavit in reply affirmed by Dato' Sulaiman bin Hj Keling on 30 September 2014 ('encl 10').

BACKGROUND FACTS

[4] The facts of the case at hand had been well illustrated by learned counsel for the respondents. I could not do any better than to adopt these facts, as follows, subject to certain modifications wherever necessary:

(a) the first applicant claimed that he is the father of the second applicant who was said to be born in Hospital Tung Shin, Kuala Lumpur,

Malaysia, by a citizen of Thailand by the name of Rai-Putta Thipphawan ('Rai-Putta') on 6 October 2010 (see exh 'A' of 'encl 10');

(b) both the first applicant and Rai-Putta were never married and/or registered their marriage at the first respondent's office;

(c) the first applicant claimed that both the first applicant and Rai-Putta were separated in April 2011 and since then, Rai-Putta had never returned to Malaysia from Thailand;

(d) after the couple separated, the second applicant was placed under the care of the first applicant's mother;

(e) the first applicant claimed that he did not have in his possession the birth certificate of the second applicant

(f) the second applicant then applied for the first time, the second applicant's citizenship on 9 April 2012 under art 15A of the FC and on 11 October 2013, the Secretary-General dismissed the second applicant's application under art 15A of the FC. The applicants received the said letter on 28 January 2014; and

(g) the applicant then filed encl 1 on 28 April 2014 and leave was granted on 14 July 2014 only with respect to prayer (iii) of encl 1.

THE ISSUES

[5] The issues posed for this court's determination are as follows:

(a) whether the applicants have fulfilled the requirement to obtain citizenship by operation of law as specified under art 14(1)(b) of the FC? and

(b) whether the issue in this judicial review application involved a non-justiciable matter, which this court does not have any jurisdiction to hear as stated under Part III, Second Schedule of the FC?

DISCUSSIONS OF THE ISSUES

[6] As stated earlier, the discussions would only involve provisions of art 14(1)(b) of the FC, s 1(e), Second Schedule, Part II of the FC.

Issue 1: Whether the applicants have fulfilled the requirements to obtain citizenship by operation of law under art 14(1)(b) of the FC?

[7] As submitted before me, under the Malaysian law, there are four ways of acquisition of citizenship, by operation of law under art 14 of the FC, by registration under art 15, 15A, 16, 16A, and 18, by naturalisation under art 19 and by incorporation of territory under art 22 (see Part III of the FC).

Citizenship by operation of law

[8] Article 14 of the FC must be read together with Part II of the Second Schedule of the FC which states as follows:

> 14 Citizenship by operation of law
>
> (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
>
> (a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part 1 of the Second Schedule; and
>
> (b) *every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.*
>
> (c) ...
>
> (d) ...
>
> (e) ...

[9] Part II of the Second Schedule of the FC provides as follows:

> Part II Second Schedule
>
> CITIZENSHIP BY OPERATION OF LAW OF PERSONS BORN ON OR AFTER MALAYSIA DAY
>
> 1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say;
>
> (a) *every person born within the Federation of whose parents one at least is at the time of the birth either a citizen or permanently resident in the Federation;* and
>
> (b) ...; and
>
> (c) ...; and
>
> (d) ..., and
>
> (e) *every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.*

[10] Based on art 14(1)(b) of the FC, read together with Part II of the Second Schedule (s 1(a)), there are five ways for a person who were born on or after Malaysia Day can become citizen by operation of law (see Part II (art 14(1)(b) of Second Schedule para 1 (a), (b), (c), (d) and (e)).

[11] As alluded earlier, it is an undisputed fact that the second applicant was born in Malaysia. However, the second applicant does not fulfill the requirement that 'his parent, or one of his parents' is a citizen of Malaysia or

permanently resident in Malaysia as envisaged by art 14 read together with Part II of the Second Schedule, for purposes of citizenship by operation of law to be granted to him. Neither could it be said that the second applicant herein falls within the definition of s 1(e) of Part II of the Second Schedule as a 'person born within the Federation who is not born a citizen of any country otherwise then by virtue of this paragraph'.

[12] Section 1(e) of Part II of the Second Schedule of the FC is inapplicable to the applicants' case and cannot be used as a ground to demand for a citizenship status under operation of law.

[13] This is due to the fact that the biological father and mother of the second applicant could be ascertained and these facts were not even disputed by the first applicant. Exhibit 'A' to encl 10 clearly, provided that the second applicant's biological father is a citizen and his biological mother Rai-Putta is a citizen of Thailand. Both this couple had not been married at the time the second applicant was born. The birth certificate of the second applicant was endorsed with 'Application Under Section 13 of the Registration of Birth and Death Act 1957'.

[14] Clearly, the citizenship of the second applicant is determinable as the second applicant's father is a Malaysian and the mother is of Thai origin and by virtue of para 1(b) of Part II of the Second Schedule, the citizenship of the applicant is determinable which is a Thailand national.

[15] Reference is made to the Nationality Act B E 2508 which was produced by the learned Senior Federal Counsel as follows:

> Chapter 1
>
> *Acquisition of Thai Nationality*
>
> *Section 7.6 The following persons acquire Thai nationality by birth:*
>
> *(1) A person born of* a father or *a mother of Thai nationality*, *whether* within or *outside the Thai Kingdom;*
>
> (2) A person born within the Thai Kingdom except the person under Section 7 bis paragraph one.
>
> 'Father' in (1) means also a person having been proved, in conformity with the Ministerial Regulation, that he is a biological father of the person even though he did not register marriage with the mother of the person or did not do a registration of legitimate child.

[16] The said provision showed that the second applicant's citizenship is the Thailand citizenship which right has been conferred pursuant to s 7 of the Thai Nationality Act B E 2508.

[17] Therefore, the contention of the applicants that the second applicant is a stateless person pursuant to s 1(e) of Part II, of the Second Schedule of the FC could not hold water because from the facts that were disclosed to this court as discussed above and by reason that the second applicant's biological mother being a Thai national and based on the Nationality Act B E 2508 the second applicant is a Thai citizen under the Thailand Nationality Act B E 2508. Despite the second applicant being an illegitimate child, he has a right to be conferred a Thai citizenship and not a Malaysian citizenship even though he was born in Malaysia.

[18] Therefore, the second applicant is definitely not a stateless person as he does not fit the definition of a 'stateless person'. The Convention Relating To The Status Of Stateless Persons defines stateless persons as person who is not considered as a national by any state under the operation of its law.

[19] It is to be noted that Malaysia has not ratified the above-mentioned convention. Therefore, the convention can be used only as a guide to classify the types of persons who may be categorised as stateless person *de jure, de facto* or otherwise.

Applicability of the international human rights conventions

[20] The applicants contended that the second applicant being a child under the age of 18 is recognised under the 'Universal Declaration of Human Rights' ('the UDHR'), and that the courts have legal duty to abide by this UDHR which is binding.

[21] As the UDHR is merely a declaration, it is not a legally binding document for this court to give effect. The UDHR is applicable in Malaysia only to the extent that it is not inconsistent with the FC. The provisions of the UDHR must be read together with s 4(4) of the Human Rights Commission of Malaysia Act 1999 ('Act 597') which provides as follows:

> For the purpose of this Act, regard shall be held to the UDHR 1948 to the extent that it is not inconsistent with the Federal Constitution.

[22] The UDHR would only be applicable upon its adoption by way of legislation pursuant to art 76 of the FC. Article 76 of the FC states as follows:

> Article 76 Power of Parliament to legislate for States in certain cases.
>
> (1) *Parliament may make laws* with respect to any matter enumerated in the State List, but only as follows, that is to say:
>
> (a) for the *purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member*; or

[23] Unlike some other constitutions in other jurisdictions, the FC does not impose on the Malaysian courts to take cognisance of international human rights laws in any of its provision.

[24] With regard to whether UDHR and United Nations documents are binding the Federal Court in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449 at pp 513–514 had clarified as follows:

> ... En Tun Majid bin Tun Hamzah, senior deputy public prosecutor for respondent started his rebuttal by stating that *reference to the international standards set by the 1948 Declaration (Universal Declaration of Human Rights 1948) and several other United Nations' documents on the right of access cannot be accepted as such documents are not legally binding on our Malaysian Courts. For this submission he relied on the case of Merdeka University Bhd where the 1948 Declaration was described as a non-legally binding instrument as some of its' provision depart from existing and generally accepted rules. It is merely a statement of principles devoid of any obligatory character and it is not part of our municipal law.*
>
> *Merdeka University* was decided in 1981. *This begs the question to whether acceptance of the 1948 Declaration as a non-legally binding has changed by virtue of s 4(4) of the Human Rights Commission Act of Malaysia. In my opinion, the status and the weights to be given to the 1948 Declaration is a resolution of the General Assembly of the United Nations and not a convention subject to the usual ratification and accession requirements for treaties. By its very title it is an instrument which declares or sets out statement of principles of conduct with a view to promoting universal respect for and observance of human in nature, they do not, I consider, have the force of law or binding on the member states.* If the United Nations wanted these principles to be more than declaratory, they could have embodied them in a convention or a treaty to which member states can ratify or accede to and those principles will then have the force of law.
>
> The fact that regard shall be had to the 1948 Declaration as provided for under s 4(4) of the Human Rights Commission of Malaysia Act makes no difference to my finding. This is so as *my understanding of the pertinent words in the subsection that 'regard shall be had' can only mean an invitation to look at the 1948 Declaration if one is disposed to do so, consider the principles stated therein and be persuaded by them if need be. Beyond that one is not obliged or compelled to adhere to them. This is further emphasised by the qualifying provisions of the subsection which states that regard to the 1948 Declaration is subject to the extent that it is not inconsistent with our Constitution.* In any event, on the particular facts of the appeals before us, *I do not see the need to have regard to the 1948 Declaration as our own laws backed by statutes and precedents as seen from the cases that I have spelt out in this judgment are sufficient for this court to deal with the issue of access to legal representation.*

[25] Section 4(4) of Act 597 declares: 'for the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution'. The Act 597 defines human rights as referring to fundamental liberties as enshrined in Part II of the FC. Therefore, the provisions of the UDHR are in fact supplemental to Part II

of the FC. Therefore, the UDHR may have constitutional dimension and status only if the provisions of the UDHR are not inconsistent with the FC.

[26] In the case before me, the second applicant is a child out of wedlock, whose biological father is a Malaysian and her biological mother holds a Thai citizen status.

[27] Learned counsel for the applicants alleged that the second applicant will be a 'stateless' person if the prayers sought for are not allowed, despite undisputed fact that the origins of the birth parents of the second applicant are known.

[28] With regard to whether the Convention on the Elimination of All Forms of Discrimination Against Women ('the CEDAW'), Convention on the Right of the Child ('the CRC') and International Convention on Civil and Political Rights ('the ICCPR') are applicable, one has to examine these international treaties against the provision of art 76 of the FC, which had clearly stated that these treaties and conventions would only have the force if adopted by way of the national legislation.

[29] This could be gleaned from the Court of Appeal case of *AirAsia Bhd v Rafizah Shima bt Mohamed Aris* [2014] 5 MLJ 318 wherein the said court had held as follows:

> [35] *Malaysia is a signatory to CEDAW and ratified it in 1995*. The first accession to the Convention was made with a number of reservations, as it was felt that the relevant articles were in contradiction with the provisions of the laws of the country. Following the Beijing Conference, steps were taken to review Malaysia's reservations to the Convention and reservations for Articles 2(f), 9(1), 16(b), (d), (e) and (h) were withdrawn. The Ministry of Women, Family and Community Development (MOWFCD) had announced the Government's intention to withdraw the reservations on Article 5(a), Article 7(b) and Article 16(2). *The remaining reservations were made to the following Articles:*
>
> *9(2): equal rights with men with respect to the nationality of their children;*
>
> 16(1)(a): equal rights to enter into marriage;
>
> 16(1)(c): equal rights and responsibilities during marriage and at its dissolution;
>
> 16(1)(f): equal rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of child; and
>
> 16(1)(g): the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.
>
> [36] It should be noted that an announcement to withdraw reservations does not amount to withdrawal until an instrument of withdrawal is deposited with the Secretary General of UN.
>
> [37] *In our considered opinion, CEDAW does not have the force of law in Malaysia*

because the same is not enacted into any local legislation.

[38] *In theoretical terms, the application of international legal systems is often explained in terms of the doctrines of incorporation (or monism) and transformation (or dualism).*

... [43] *The combined effect of Article 74(1) and the 'Federal List' in Ninth Schedule to the Constitution is that the Federal Parliament has exclusive power to make laws relating to external affairs and relations with other countries (including through treaties, agreements and conventions), as well as the power to implement treaties, agreements and conventions.* With regard to the Executive power of the Federation, Article 39 provides that it shall be vested in 'the Yang di-Pertuan Agong and exercisable ... by him or by the Cabinet or by any Minister authorised by the Cabinet'. *Since Article 80 ensures that the Executive authority of the Federation extends to all matters with respect to which Parliament may make laws, this means that the Cabinet or its authorised Minister is effectively vested with the power to do all acts necessary for negotiating, making, signing and ratifying treaties and other agreements entered into with other countries.*

[44] *When it comes to giving effect to treaty provisions in domestic law, however, it remains the case that for a treaty to be operative in Malaysia,legislation passed by Parliament is a must. This is despite suggestions that there may be some treaties which could be implemented locally without any necessity for the introduction of a statute.* (See *Heliliah bt Haji Yusof, 'Internal Application of International Law in Malaysia and Singapore', [1969] Singapore Law Review*, 62–71 at p 65*). In other words, even though the Executive has ratified a treaty and the treaty binds the Government under international law, it has no legal effect domestically unless the legislature passes a law to give effect to that treaty.*

[30] The CRC has been ratified by Malaysia in 1995. With regard to the applicability of article 7 of the CRC, Malaysia had placed its reservation on matters touching citizenship. Hence, article 7 of the CRC does not absolutely bind Malaysia as its applicability is subject to the FC, national laws and national policies of the Government of Malaysia. The provisions of article 7 of the CRC are as follows:

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Reservation:

The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles 2, 7, 14, 28 paragraph 1(a) and 37, of the Convention and declares that the said provisions shall

be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.

[31] International treaties do not form part of the law in Malaysia unless such treaties have been incorporated into the municipal law. This principle is supported by the case of *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297 where the Federal Court held:

> [180] On the issue whether this court should use 'international norms' embodied in the UNDRIP to interpret arts 5 and 13 of the Federal Constitution I have only this to say. *International treaties do not form part of our law, unless those provisions have been incorporated into our law. We should not use international norms as a guide to interpret our Federal Constitution.* Regarding the issue of determining the constitutionality of a statue, Abdul Hamid Mohamad PCA (as he then was) in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 at p 17 had this to say:
>
> > *So, in determining the constitutionally or otherwise of a statue under our Constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers*. As Raja Azlan Shah FJ (as His Royal Highness then was) quoting Frankfurter J said in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (FC) said: 'The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it'.

[32] The above principle had been reiterated in *SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri)* [2010] 2 MLJ 377 at p 394 where the court held:

> [37] Secondly, *in relation to the applicability of international norms* and the approach as exemplified in the Australian case of *Teoh, the position adopted by the Malaysian courts has been not to directly accept norms of international law unless they are incorporated as part of our municipal law: See Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356, for example. *I do not believe this position has changed even with the passing of s 4(4) of the Human Rights Commission Act 1999, and its exhortation that 'regard' shall be had to the Universal Declaration of Human Rights 'to the extent that it is not inconsistent with the Federal Constitution'.* As for the judicial approach in *Teoh*, I note that even in Australia, this decision has had its fair share of criticism. See eg Alison Duxbury, The impact and significance of Teoh and Lam in Groves & Lee, *Australian Administrative Law — Fundamentals, Principles and Doctrines* (2007; Cambridge University Press): 'The cases of Teoh and Lam are part of what has been termed 'a titanic struggle' between the Australian Government and the judiciary over the power to review executive decisions that fall within the ambit of the Migration Act' (at p 300 of the book).

[33] The Malaysian courts had been consistent in their approach to adopt international norms and this could be seen through the judgments of the court discussed above. The court would refer to these international norms only if the same had been incorporated by way of municipal law. In so far as citizenship is

concern the only law which provides for citizenship in the FC. As these international norms had not been incorporated into our FC, this court could not rely on these international norms.

[34] In view of the above, the applicant is not entitled to be registered as a citizen of Malaysia pursuant to article 7 of the CRC as the convention is not in conformity with art 14(1)(b) of the FC.

[35] The applicant had failed to satisfy this court that the relevant treaty and/or convention had been adopted by way of a specific act. Hence there was no evidence before me to show that these international human rights conventions are applicable to the factual matrix of the case to allow the said application under art 14(1)(b) FC read together with para 1(e) of Part II of the Second Schedule of the FC.

[36] A careful reading of para 1(e) of Part II of the Second Schedule of the FC it is apparent that *'every person born within the Federation who is not born a citizen of any country'* clearly denotes that the second applicant has not fulfilled the requirement of '*who is not born a citizen of any country*' as the second applicant has automatically obtained citizenship by birth in Thailand.

[37] Thus, the applicant does not at all fit in with the requirement under paragraph 1(e) of the Part II, Second Schedule of the FC.

Issue 2: Whether the matter at hand is a non-justiciable matter which this court does not have any jurisdiction to hear as provided for under Part III, Second Schedule of Federal Constitution.

[38] The matter surrounding this judicial review application concerned a decision made pursuant to art 14 of Part III of the FC which matter is non-justiciable as provided under Section 2, Part III of the Second Schedule of the FC. The provision clearly ousts the jurisdiction of the court to decide on issues relating to the decision on the citizenship of the second applicants. This provision is applicable to application of citizenship under art 14(1)(b) of the FC.

[39] The court would normally refuse to grant leave in cases touching matters, which are non-justiciable. This principle had been stated in the Court of Appeal case of *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60 at pp 67 and 69; [2006] 1 CLJ 927; where Gopal Sri Ram JCA held:

> ... Applications for leave under O 53 are made — and they must be made — through a two stage process ... The High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous.

> If, for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunized from being impleaded in legal proceedings then the High Court would be justified in refusing leave in limine. *So too will the court be entitled to refuse leave it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, eg, proceedings in Parliament …* (paras 5 and 10).

[40] In the case of *Kuluwante (an infant) v Government of Malaysia & Anor* [1978] 1 MLJ 92 at p 95, His Lordship, Yusoff J in dealing with the case concerning application of citizenship by way of registration under art 15 of the FC had aptly made observation on the effect of s 4 of Part III of the Second Schedule that it excludes the jurisdiction of the court to entertain a claim for declaration of citizenship under Part III of the FC.

[41] In view of the aforesaid, it is obvious that the judicial review aplication filed by the applicant ought not to be entertained by this court as the FC does not at all provide the avenue for the applicants herein.

[42] The applicants failed to show in this application that the second applicant *is entitled as of right to be a Malaysian citizen by operation of law under art 14(1)(b) of the FC.* Based on the evidence tendered by the applicants obviously, the applicants have not satisfied this court that they have fulfilled the requirement stipulated under the Second Schedule, Part II s 1(e) of the FC.

[43] It would appear that the Federal Government has the sole discretion and power to grant Malaysian citizenship to persons applying under art 14 of the FC and the said decision is non-justiciable for this honorable court's consideration.

CONCLUSION

[44] In view of the above this court has no choice but to dismiss the judicial review application with costs of RM2,000 to be paid by the applicants to the respondents.

Application dismissed with costs of RM2,000.

Reported by Dzulqarnain Ab Fatar